KREDIN SDN BHD

v.

OCBC BANK (MALAYSIA) BHD

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
WAN ADNAN ISMAIL CJ (MALAYA)
EDGAR JOSEPH JR FCJ
[CIVIL APPLICATION NO: 08-38 OF 1997 (W)]
12 MAY 1998

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Leave to appeal - Section 96 Courts of Judicature Act 1964 - Grant of leave - Whether discretion resides in Federal Court to give or withhold permission - Whether an appeal lies as of right under and by virtue of s. 96 from Court of Appeal to Federal Court - Courts of Judicature Act 1964, ss. 74(1)(a)(i) & (ii), 74(2)(a) & (b), 75, 96, 97 - Courts of Judicature (Amendment) Act 1982, s. 6 - Rules of the Federal Court 1995, rr. 47(1) & (4), 108(1)(c), 109*

STATUTORY INTERPRETATION: *Canons of construction - Enactment open to two opposing constructions - Determination of construction that corresponds to the legal meaning - Duty of court - Whether to examine the consequences of giving effect to each construction thereof*

STATUTORY INTERPRETATION: *Construction of statutes - Section 96 Courts of Judicature Act 1964 - Appeal to Federal Court - Requirement of leave to appeal - Whether appeal under the section lies as of right from the Court of Appeal to the Federal Court*

WORDS & PHRASES: *"Subject to"- Section 96 Courts of Judicature Act 1964 - Meaning of*

The appellant sought to appeal against a decision of the Court of Appeal, and applied to the Federal Court for leave to appeal under s. 96 Courts of Judicature Act 1964 ('Act 91'). At the outset, the appellant contended, however, that although the word 'leave' normally implies a discretion, no such discretion was implied by ss. 96 and 97 of Act 91, and that being so, leave to appeal ought to be granted by the Federal Court **as of right**, and not as a matter of **discretion**. This, according to the appellant, must be the law, as the Privy Council in *Lopez v. Valiappa Chettiar*, upon scrutinising s. 74(1)(a)(i) and (ii) of Act 91, in the form it then took, ruled that a party could appeal as of right from the (old) Federal Court to the Yang di-Pertuan Agong and that the Federal Court only had discretion to refuse leave under the provisions

of ss. 74(1)(a)(iii) and 74(1)(b) thereof. The respondent, on their part, argued that the opinion of the Judicial Committee in *Lopez* was given *per incuriam* having entirely overlooked the provisions of s. 74(2)(a) and (b) of Act 91, and that, s. 74(2), properly construed, implied that the old Federal Court had a discretion to refuse leave to appeal in any of the four cases referred to in s. 74(1). The respondent also submitted that **discretion**, in any case, must reside in the Federal Court by virtue of the words "subject to" appearing in s. 96 of Act 91. Against these background facts, a preliminary point of law was thus posed for the determination of the learned appellate judges, namely, whether under and by virtue of s. 96 of the Courts of Judicature Act 1964 an appeal lies as of right from the Court of Appeal to the Federal Court.

Held:
Per Edgar Joseph Jr FCJ

[1] The observations of the Judicial Committee of the Privy Council on the effect of s. 74(1)(a)(i) and (ii) of the Courts of Judicature Act 1964, as the section stood then, were *dicta*. However, they are *dicta* which are entitled to great weight.

[2] Section 74(2) cannot be said to have implied that the old Federal Court had a discretion to refuse leave to appeal in any of the four cases referred to in s. 74(1). Upon its true construction, s. 74(2)(a) and (b) meant that in civil matters, special leave to appeal may be granted where the old Federal Court had, for some reason, declined leave or the intending appellant had failed to apply to that court for leave properly in accordance with the procedure regulating such applications, as for example, when the matter in dispute did not fall within the definition of the relevant legislation regulating the granting of leave or when the application is not made within the time limited for the purpose.

[2a] The decision in *Lopez* also shows that the mere fact that the old Federal Court had wrongly refused to grant leave as of right did not of itself entitle the intending appellant to obtain special leave. *Lopez*, however, was nullified by the Courts of Judicature (Amendment) Act 1982.

[3] Sections 96 and 97 of Act 91 conspicuously omit any reference to matters falling within the prescribed monetary extent or designated value as provided under s. 74(1)(a)(i) and (ii). Section 96 also conspicuously omits: (i) any reference to matters falling within s. 74(1)(a)(iii), which unmistakably imports a **discretion** to grant or refuse leave; (ii) any reference to matters falling within s. 74(1)(b) which concerns interlocutory judgments or orders, which also unmistakably imports a

discretion to grant or refuse leave; and (iii) the proviso to s. 74(1)(a), inserted by s. 6 of the Courts of Judicature (Amendment) Act 1982, which nullified *Lopez*, and which proviso imports a **discretion** to refuse leave even in cases falling within the prescribed monetary extent or designated value, as provided under s. 74(1)(a)(i) and (ii).

[3a] The aforesaid notwithstanding, the words "subject to" in the opening phrase of s. 96 should be given the same meaning as that given by Neal J in his dissenting judgment in *Government of Federation of Malaya v. Surinder Singh Kanda*, namely, "subject to the procedural limitations of". It is therefore the clear intention of Parliament that the conditions upon which leave to appeal may be granted is to be subject to the "rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal". This being the case, it is necessary to turn to the Rules of the Federal Court 1995.

[4] Rule 108(1)(c) Rules of the Federal Court 1995 stipulates that when granting leave to appeal, the court may *inter alia* determine the questions or issues which ought to be heard in the appeal. It follows that, if the court finds that, despite conscientious effort, it is unable to determine the questions or issues which ought to be heard, then it would be dutybound to dismiss the application. This indicates that a **discretion** resides in the court to give or withhold permission.

[4a] By r. 109 Rules of the Federal Court 1995, whenever the Federal Court is not in session, an application for leave to appeal may be made to a single Judge of the Federal Court who would be empowered to make any order that could be made by the Federal Court on such an application, provided that any order so made may be varied or discharged by the Federal Court. Clearly, this rule also import a **discretion.**

[5] The court was fortified in the view it took that **no** appeals lie **as of right** under and by virtue of s. 96 from the Court of Appeal to the Federal Court by certain general considerations – such as the object of making appeals subject to leave, which is to prevent frivolous and needless appeals, and the need to apply a familiar canon of construction when confronted with two opposing constructions of an enactment, which is to take into account the likely consequences of applying each construction both to the parties before it and to the law generally.

[5a] Applying the above canon of construction, the construction as contended for by the appellant cannot be correct, as the consequences of adopting such construction would be that, however frivolous and needless an appeal may be from the decision of the Court of Appeal, it would have to be entertained by the Federal Court, with the result that the requirement for leave in s. 96, instead of checking appeals, would open the floodgates to a spate of hopeless appeals.

[6] Having regard to the provisions of ss. 96 and 97 of Act 91, read with the Rules of the Federal Court 1995, the requirement of leave is meant to impose a fetter on appeals so as to avoid overburdening the court of last resort with a spate of appeals as of right. The preliminary point of law must therefore be answered in favour of the respondent, namely, in a civil cause or matter, leave to appeal from the Court of Appeal to the Federal Court is a matter of **discretion** and not of right.

[Question of law answered in the negative. Hearing of application to proceed on merits.]

Cases referred to:

Chikwakwata v. Bosman [1965] SALR 57 ***(refd)***
Daily Telegraph Newspaper Co v. McLaughlin [1904] AC 776 ***(cit)***
Government of the Federation of Malaya v. Surinder Singh Kanda [1961] 27 MLJ 121 ***(foll)***
ICI Ltd v. Shatwell [1965] AC 656 ***(refd)***
Lady Davis & Anor v. Lord Shaughnessy & Anor [1932] AC 106 ***(cit)***
Lane v. Esdaile [1891] AC 210 ***(refd)***
Lopez v. Valliappa Chettiar [1968] 1 MLJ 224 ***(refd)***
Massey-Harris Co v. Straburg [1941] 4 DLR 620 ***(refd)***
McLoughlin v. O'Brian & Ors [1983] 1 AC ***(refd)***
R v. Committee of Lloyd's, ex p Moran (1983 The Times 24 June) ***(refd)***
R v. Stratford-On-Avon District Council, ex p Jackson [1985] 1 WLR 1319 ***(refd)***
Ratnam v. Cumarasamy [1962] 28 MLJ 330 ***(cit)***
Re Housing of the Working Classes Act 1890, ex p Stevenson [1892] 1 QB 609 ***(refd)***
Tengku Aishah & Ors v. Wardley Ltd [1993] 1 SLR 490 ***(refd)***

Legislation referred to:

Courts of Judicature (Amendment) Act 1982, s. 6,
Courts of Judicature Act 1964, ss. 74(1)(a)(i), (ii), (iii), (b), (2)(a), (b), 75, 96, 97
Federal Constitution, art. 144(1)
Rules of the Federal Court 1995, rr. 47(1), (4), 108(1)(c), 109

For the applicant - KS Narayanan (Joseph Yeo & Saranjit Singh with him); M/s Jayaraman, Ong & Co

For the respondent - Porres P Royan (John Mathew with him); M/s Shook Lin & Bok

[Appeal from Court of Appeal; Civil Appeal No: W-02-642 of 1995]

Reported by WA Sharif

JUDGMENT

Edgar Joseph Jr FCJ:

At the outset of the hearing of this application for leave to appeal from the decision of the Court of Appeal to this Court, Mr. Narayanan for the appellant raised the preliminary point of Law: whether an appeal lies *as of right* from a judgment of the Court of Appeal to this Court? The matter is regulated by s. 96 of the Courts of Judicature Act 1964, (Act 91) which provides:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court granted in accordance with s. 97:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; and
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

Section 97 provides:

> (1) An application under s. 96 for leave to appeal to the Federal Court shall be made to the Federal Court within one month from the date on which the decision appealed against was given, or within such further time as may be allowed by the Court.
>
> (2) Where the judgment appealed against requires the appellant to pay money or perform a duty, the Federal Court shall have power, when granting leave to appeal, either to direct that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just; and in case the Court shall direct the judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of that Court for the due performance of any order as the Federal Court may make in order to give effect thereto.

In support of his contention that an appeal lies as of right from the Court of Appeal to this Court, Mr. Narayanan surveyed the history of the legislation which preceded the Courts of Judicature Act 1964 (Act 91), and referred us to the judgment of the Privy Council in *Lopez v. Valliappa Chettiar* [1968] 1 MLJ 224, where the Privy Council after referring to the history of the relevant legislation, and citing with approval the judgment of the Federation Court of Appeal in *Ratnam v. Cumarasamy* [1962] 28 MLJ 330, was of the opinion that under the provisions of s. 74(1)(a)(i) and (ii) of the Courts of Judicature Act 1964, in the form that it then took, a party could appeal *as of right* from the Federal Court to the Yang di-Pertuan Agong and that the Federal Court only had the *discretion* to refuse leave under the provisions of ss. 74(1)(a)(iii) and 74(1)(b). Section 74(1) of the Courts of Judicature Act 1964, in the form that it then took, provided that an appeal shall lie from the Federal Court to the Yang di-Pertuan Agong with the leave of the Federal Court granted in accordance with the provisions of s. 75:

> (a) from any final judgment or order in any civil matter where:
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> (i) the matter in dispute in the appeal amounts to or is of the value of five thousand dollars upwards; or
>
> (ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or
>
> (iii) the case is from its nature a fit one for appeal, and
>
> (b) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal.

Section 75 was equivalent in all material respects to s. 97 of Act 91.

The opinion of the Privy Council in *Lopez* was approved by the Singapore Court of Appeal in *Tengku Aishah & Ors. v. Wardley Ltd.* [1993] 1 SLR 490 in a carefully reasoned judgment, the Court holding, that a party could appeal as of right from the Court of Appeal to the Judicial Committee of the Privy Council under the equivalent provisions to s. 74(1)(a)(i), and (ii) and, subject to the further requirement – peculiar to the Singapore legislation – that the necessary consent in writing to be bound by an appeal to the Judicial Committee, having been duly given.

Mr. Narayanan rightly recognised that the word "leave" normally implies a discretion (per Beadle CJ in the South African Court of Appeal case of *Chikwakwata v. Bosman* [1965] SALR 57) but argued that no such discretion was implied having regard to the context the relevant legislation which

specifically provides that leave under the provisions of s. 96 refers to leave granted under s. 97, which, in turn, provides for the time within which an application for leave may be made and the directions which the Federal Court may give when granting leave as therein stipulated.

Mr. Royan for the respondent began by pointing out that the opinion expressed by the Privy Council in *Lopez,* to which we have referred, was really *obiter*, since the application before the Privy Council in that case was one for *special leave* which, undoubtedly, is a matter of discretion and not of right. (See, *Lady Davis & Anor. v. Lord Shaughnessy & Anor.* [1932] AC 106 PC and also, *Daily Telegraph Newspaper Co. v. McLaughlin* [1904] AC 776 for the circumstances in which special leave will be granted).

We are inclined to agree with Mr. Royan that the observations of the Judicial Committee of the Privy Council on the effect of s. 74(1)(a) (i) and (ii), were *dicta*, but having regard to the status of that august body, and the fact that it had heard full argument on the point at issue and given careful consideration to it, they are *dicta* which are entitled to great weight.

Next, Mr. Royan argued that the opinion of the Privy Council in *Lopez* was given *per incuriam* as it entirely overlooked the provisions of s. 74(2)(a) and (b) of the Courts of Judicature Act 1964, in the form that it then took. Section 74(2) provided as follows:

> An appeal shall also lie from the Federal Court to the Yang di-Pertuan Agong in the following cases:
>
> (a) in any case mentioned in sub-s. (1) where the leave of the Federal Court has not been duly obtained;
>
> (b) in any case arising in a civil matter other than the cases referred to in sub-s. (1); and
>
> (c) in any criminal matter,
>
> where application for special leave to appeal has been made to the Yang di-Pertuan Agong, and the Yang di-Pertuan Agong, acting on the recommendation of the Judicial Committee, has granted special leave to appeal.

It was accordingly submitted that s. 74(2)(a) implied that the old Federal Court had a discretion to refuse leave to appeal in any of the four cases referred to in s. 74(1), including cases falling within the prescribed monetary extent or designated value as prescribed under s. 74(1)(a)(i) and (ii), respectively.

With respect, we cannot agree with this submission. In our view, upon its true construction s. 74(2)(a) and (b) meant that in civil matters, special leave to appeal may be granted where the old Federal Court had, for some reason, declined leave or the intending appellant had failed to apply to that Court for leave properly in accordance with its procedure regulating such applications; for example, when the matter in dispute did not fall within the definition of the relevant legislation regulating the granting of leave or when the application is not made within the time limited for the purpose.

We would add that the *Lopez* case also shows that the mere fact that the old Federal Court had wrongly refused to grant leave as of right did not of itself entitle the intending appellant to obtain special leave.

Be that as it may, we note that *Lopez,* was nullified by subsequent legislation, to wit, the Courts of Judicature (Amendment) Act 1982, which provided:

> 6. Subsection (1) of s. 74 of the principal Act is amended – ... (c) by inserting immediately after sub-para. (ii) of para. (a) the following new proviso: 'Provided that the Federal Court may refuse leave under sub-paras (i) and (ii) of this paragraph if it appears that the intended appeal substantially or in essence involved factual grounds; or ...'

However, ss. 96 and 97 of the Act 91, with which we are concerned in the present application, conspicuously omits any reference to matters falling within the prescribed monetary extent or designated value as provided under s. 74(1)(a)(i) and (ii), respectively, of its predecessor, which, according to the Privy Council, in *Lopez,* gave an appeal *as of right*. So, also, s. 96 conspicuously omits any reference to matters falling within s. 74(1)(a)(iii), which unmistakably imports a *discretion* to grant or refuse leave by reason of the words "the case is from its nature a fit one for appeal". Similarly, s. 96 conspicuously omits any reference to matters falling within s. 74(1)(b), which concerns interlocutory judgments or orders, which also, unmistakably imports a *discretion* to grant or refuse leave by reason of the words 'the case is from its nature a fit one for appeal". Likewise, s. 96 omits the proviso to s. 74(1)(a), inserted by s. 6 of the Courts of Judicature (Amendment) Act 1982, which nullified *Lopez,* and which proviso clearly imports a *discretion* to refuse leave, even in cases falling within the prescribed monetary extent or designated value, as provided under s. 74(1)(a)(i) and (ii), since it empowered the Federal Court to refuse leave "if it appears that the intended appeal substantially or in essence involved factual grounds".

More to the point, Mr Royan directed our attention to the opening words of s. 96 which say this: "*Subject to* any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal ..." (Italics added) and argued – and we agree – that the words "subject to" should be given the same meaning as that given by Neal J in his dissenting judgment in *Government of the Federation of Malaya v. Surinder Singh Kanda* [1961] 27 MLJ 121, a meaning endorsed on appeal to the Privy Council by Lord Denning (see [1962] 28 MLJ 169 171). In that case, Neal J when considering the meaning of the words "subject to the provisions of any existing law" in art. 144(1) of the Federal Constitution said at p. 138 col. 2 B:

> I have come to the conclusion that the meaning which reading the Constitution as an entirety and having regard to the consideration of what is happening on the granting of a fresh Constitution, I ought to give to the words, "subject to," is following Denman CJ "Subject to the procedural limitations of," or alternatively to follow the wording of Lord Simonds in *Smith's* case and to say the jurisdiction is given to be exercised "within the restrictions or limitations imposed by," and this meaning is well within the limits of the range of meanings given to the words, "subject to," by the Courts throughout the British Commonwealth; ...'

So also, in the Canadian case of *Massey-Harris Co. v. Straburg* [1941] 4 DLR 620, MacDonald JA put the point simply but clearly when he said (at p. 622):

> (When) a provision in a statute is 'subject to' another provision requiring something to be done, the first provision is conditional upon the performance of what is required by the provision referred to.

Thus, it is the clear intention of Parliament that the conditions upon which leave to appeal may be granted is to be subject to the "rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal".

We must, therefore, turn to the Rules of the Federal Court 1995, to see whether there is anything there which will assist us in our inquiry.

First of all, an appeal to the Federal Court shall be by way of re-hearing. (Rule 47(1)). Secondly, the hearing of the appeal shall be confined to matters, issues and questions in respect of which leave to appeal has been granted. (Rule 47(4)). Thirdly, and more importantly, when granting leave to appeal the Court may, *inter alia*, determine the questions or issues which ought to be heard in the appeal. (Rule 108(1)(c)). We say "more importantly", because, if for instance, the Court finds that despite conscientious effort it is unable to determine the questions or issues which ought to be heard, then it would be duty bound to dismiss the application thus clearly indicating that a *discretion*

resides in the Court to give or withhold permission. Fourthly, whenever the Federal Court is not in session, an application for leave to appeal may be made to a single Judge of the Federal Court who would be empowered to make any order that could be made by the Federal Court on such an application provided that any order so made may be varied or discharged by the Federal Court (r. 109). This last mentioned rule would also import a *discretion.*

We do not overlook the point that there is no rule requiring the application for leave to set forth shortly the facts and points of law, and to conclude with a summary of reasons for leave being granted.

Having said that, we have to add that we are fortified in the view we take that no appeal lies *as of right* under and by virtue of s. 96 from the Court of Appeal to the Federal Court by certain general considerations to which we shall now refer.

One starts with the general proposition that the object of making appeals subject to leave is to prevent frivolous and needless appeals (In *re Housing of the Working Classes Act 1890, ex parte Stevenson* [1892] 1 QB 609 per Fry LJ at p. 612.) That being the underlying common sense of a rule which provides that an appeal shall not lie unless leave to bring the same is given, we are reminded of the words of Lord Halsbury LC in *Lane v. Esdaile* [1891] AC 210: "How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal?"

Secondly, it is a familiar canon of construction that when considering which of two opposing constructions of an enactment corresponds to its legal meaning, the Court of construction should take into account the likely consequences of applying each construction both to the parties before it and for the law generally. Support for this view may be derived from *R v. Committee of Lloyd's, ex parte Moran* [1983] The Times, 24 June where Mustill J (as he then was) said: "a statute or contract cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it." Similarly, in *ICI Ltd. v. Shatwell* [1965] AC 656, 675, Lord Radcliffe said that he had begun by considering the consequences of the apparent meaning of the enactment, and found these disquieting. He then continued: "I start then with the assumption that something must have gone wrong in the application of the legal principles that produce such a result."

Applying this canon of construction to the case before us, we therefore ask ourselves what would the consequences be if the construction contended for by Mr. Narayanan is correct. The result would be that however frivolous and needless an appeal may be from the decision of the Court of Appeal it would have to be entertained by the Federal Court, with the result that the requirement for leave in s. 96 of the statute, instead of checking appeals would multiply them to "a most mischievous extent". (See, *In re Housing of the Working Classes Act 1890, ex parte Stevenson (ibid)* per Lopes LJ *(ibid)* at p. 613). This reasoning is known as the "floodgates" argument, meaning that if appeals lie *as of right* from the Court of Appeal to the Federal Court, then this will open the floodgates to a spate of hopeless appeals. The case of *R v. Stratford-On-Avon District Council, ex parte Jackson* [1985] 1 WLR 1319, at 1322 goes so far as to indicate that judges are especially willing to apply a strained construction on consequential grounds where this will operate to assist the work of the Courts.

Having said that, we hasten to add, that we do not consider that the floodgates argument should always prevail for it it axiomatic that where the meaning of a statute is clear the Courts must give effect to the will of Parliament as expressed in the law, whatever the practical consequences may be.

Nor have we overlooked what Lord Edmund-Davies said in *McLoughlin v. O'Brian & Ors*. [1983] 1 AC when he had occasion to play down the floodgate argument in the following terms:

> My Lords, the experiences of a long life in the Law have made me very familiar with this "floodgates" argument. I do not, of course suggest that it can invariably be dismissed as lacking cogency; on the contrary, it has to be weighed carefully, but I have often seen it disproved by later events.

In all the circumstances, regard being had to the provisions of ss. 96 and 97 of the Courts of Judicature Act 1964 (Act 91), read with the Rules of the Federal Court 1995, the requirement of leave to appeal is meant to impose a fetter on appeals so as to avoid overburdening the Court of last resort with a spate of appeals as of right

In the result, we would answer the preliminary point of Law in favour of the respondent; that is to say, that in a civil cause or matter, leave to appeal from the Court of Appeal to the Federal Court is a matter of *discretion* and not of *right.*

The hearing of the present application for leave to appeal must, therefore, proceed on the merits.

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